

D.P.U. 90-DS-50

Adjudicatory hearing in the matter of a possible violation of General Laws Chapter 82, Section 40, by D.F. Callahan, Inc.

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APPEARANCES: Daniel F. Callahan  
D.F. Callahan, Inc.  
761 Grove Street  
Worcester, Massachusetts 01605  
FOR: D.F. CALLAHAN, INC.  
Respondent

Mario Reid, Compliance Officer  
Division of Pipeline Engineering and Safety  
Department of Public Utilities  
Boston, Massachusetts 02202  
FOR: THE DIVISION OF PIPELINE  
ENGINEERING AND SAFETY

## I. INTRODUCTION

On March 26, 1991, the Division of Pipeline Engineering and Safety ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to D.F. Callahan, Inc. ("Respondent"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on November 16, 1990, at 67 Darnell Road in Worcester, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to exercise reasonable precautions, causing damage to an underground service line operated by Commonwealth Gas Company ("Commonwealth Gas" or "Company"). The NOPV also stated that the Respondent has the right to either appear before a Department hearing officer in an informal conference on April 23, 1991, or send a written reply to the Department by that date.

On April 20, 1991, the Respondent replied by letter, stating that it had not violated the Dig-Safe Law. In that letter, the Respondent stated that it had obtained a proper Dig-Safe number and that it was digging by hand to locate underground facilities when damage was caused to a service line. In a letter dated May 8, 1991, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and informed the Respondent of its right to request an adjudicatory hearing.

On May 13, 1991, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07(3). After due notice, an adjudicatory hearing was held on October 17, 1991. Mario Reid, a compliance officer with the Division, represented the Division. Daniel Callahan testified for the Respondent. All exhibits offered were moved into evidence by the Department.

## II. SUMMARY OF FACTS

A. The Division's Position

The underground damage report offered by the Division indicates that on November 16, 1990, the Respondent damaged a Company service line at 67 Darnell Road in Worcester (Exh. D-1). The Division alleged that the Respondent had failed to render proper initial notification (Tr. at 31).

The Division contended that although the Respondent had properly obtained Dig-Safe numbers for several locations in close proximity to 67 Darnell Road, the Respondent did not request a marking at 67 Darnell Road (id. at 11-13). In support of its contention, the Division presented a comprehensive list of the Dig-Safe requests made by the Respondent in 1990 (Exh. D-7). That list indicated that a request for marking at 67 Darnell Road had not been made in 1990 (Tr. at 12-13; Exh. D-7). The Division also contended that utility companies are not obligated to mark facilities located on the sides of streets opposite to the requested marking address (Tr. at 28-29). The Division further contended that had the Respondent obtained a marking for 67 Darnell Road, the damage might not have occurred (id. at 15).

B. The Respondent's Position

Mr. Callahan testified that he could not remember whether all of the gas facilities at 67 Darnell Road were marked (id. at 22). Mr. Callahan also testified that the Respondent had obtained a Company map during the excavation that showed the location of all underground company facilities in the area of excavation (id. at 18). He further testified that this map would have been used by the Company to mark the facilities if the Respondent had obtained another Dig-Safe number in the general vicinity (id. at 18-19).

Mr. Callahan stated that 67 Darnell Road was directly across from 72 Darnell Road, where the Respondent had obtained a proper Dig-Safe number (id. at 14-15). He also stated that in his experience, when a proper Dig-Safe number was obtained, the Company had marked across the entire street, regardless of which side of the street the Respondent had named as a location (id. at 22, 27-28). Therefore, he maintained that because he had obtained a Dig-Safe number for 72 Darnell Street, it was not important as to whether he had obtained a Dig-Safe number for 67 Darnell Street (id. at 22).

Mr. Callahan stated that the Respondent was aware of the location of the Companies service at 67 Darnell Road (id. at 24). Mr. Callahan maintained that because the Respondent knew the location of the facility, and had been hand-digging to locate the facility, the question of whether the Respondent had obtained a Dig-Safe number for that exact location was not important (id. at 24).

Mr. Callahan testified that the Respondent had been attempting to locate underground facilities by digging with a hand-shovel when the damage occurred (id. at 5, 15-16). He also testified that the damage to the Company's service line had been a small slit in the line, and that the line had not been severed (id. at 21). He further testified that the Respondent had done everything possible to protect the underground facilities from damage (id. at 25).

### III. STANDARD OF REVIEW

G.L. c. 82, § 40 states in pertinent part:

No person shall... contract for, or make an excavation... unless at least seventy-two hours, exclusive of Saturdays, Sundays and legal holidays, but not more than thirty days, before the proposed excavation is to be made such person has given an initial notice in writing of the proposed excavation to such natural gas pipeline companies, public utility companies,

cable television companies and municipal utility departments as supply gas, electricity, telephone or cable television service in or to the city or town where such excavation is to be made. Such notice shall set forth the name of the street or the route number of said way and a reasonably accurate description of the location in said way or on private property the excavation is to be made...

The Department has held that a contractor's notice must adequately name the street of the proposed excavation, and give a reasonably accurate description of the location where the excavation is to be made. Weston Geophysical Corporation, D.P.U. 89-DS-115 (1993); Boston Gas Company, D.P.U. 88-DS-3 (1990). The statute assigns to the company the responsibility to mark the location of all company facilities in the area of the proposed excavation.

In Silversmith, D.P.U. 89-DS-111 (1993), an excavator's description of an area to be excavated was considered "reasonable" by the Department where the excavation occurred within the boundaries of, and on the side of the street closest to, the address requested to be marked by the Respondent. The Department also held that excavating in an area over 100 feet from the area requested by an excavator to be marked was not "reasonably accurate" as the Dig-Safe Law mandates. R.J. Cincotta Co., Inc., D.P.U. 89-DS-76 (1990).

In addition, the Department has found that a utility is not in violation of the Dig-Safe Law when it fails to mark facilities that are not located within the area originally requested by an excavator. See Colonial Gas Company, D.P.U. 86-DS-23 (1987). In that case, an excavator requested markings for 25 Bradford Road and then excavated across the street at 24 Bradford Road, causing damage to an unmarked company facility. Because the excavation took place across the street from the address requested to be marked by the excavator, the company was not found in violation of the Dig-Safe Law for failing to mark those facilities.

### III. ANALYSIS AND FINDINGS

The issue to be decided in this case is whether the excavator failed to render proper notification before excavation.

Although the Respondent's witness could not remember whether the Respondent requested 67 Darnell Road to be marked by the Company and contended that a Dig-Safe number was not necessary, he did not refute the Division's contention that the Respondent did not obtain a Dig-Safe number for that location. In fact, the Respondent presented no evidence that might support a finding that the Respondent made a proper Dig-Safe request for marking, or that markings existed at 67 Darnell Road. Accordingly, based on the record, the Department finds that the Respondent made no request for markings at 67 Darnell Road.

The Respondent's witness contended that his experience as an excavator led him to believe that companies consistently marked entire streets in front of any address given, and not just the side of the street that was closest to the location requested.

Therefore, the Respondent contended that the service line for 67 Darnell Road should have been marked because it was directly across the street from 72 Darnell Road, a site where the Respondent had requested marking. However, there were no such instructions on the Respondent's Dig-Safe requests for marking in the areas surrounding 67 Darnell Road. Although companies may occasionally mark facilities across streets to increase safety, they are not obligated to do so under the Dig-Safe Law.<sup>1</sup>

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<sup>1</sup> The Department recommends that in most instances, companies should mark underground facilities in the street only within the property boundaries of the address given by the Respondent, and only on the side of the road closest to that address, unless instructed otherwise in a Dig-Safe request.

The Department has consistently held that an excavator's description of the site to be excavated must be reasonably accurate. See Weston Geophysical Corporation, supra; Boston Gas Company, supra; R.J. Cincotta, supra. Here, the Respondent excavated at 67 Darnell Road without including a reasonably accurate description of the location to be excavated. In addition, the Respondent failed to request a separate marking for 67 Darnell Road. Accordingly, the Department finds that by excavating at 67 Darnell Road without properly requesting markings for that location, the Respondent violated the Dig-Safe Law.<sup>2</sup>

#### IV. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That D.F. Callahan, Incorporated, violated the Dig-Safe Law when it failed to render proper Dig-Safe notification before excavating at 67 Darnell Road, in Worcester on November 16, 1990; and it is

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<sup>2</sup> Because the Department found the Respondent to have violated the Dig-Safe Law for a failure to provide proper notice, the issue of whether reasonable precautions were used is moot and need not be addressed.

ORDERED: That D.F. Callahan, Incorporated, being a repeat violator of the Dig-Safe Law, shall pay the minimum civil penalty of \$500 to the Commonwealth of Massachusetts by submitting a check or money order in that amount to the Secretary of the Department of Public Utilities, payable to the Commonwealth of Massachusetts, within 30 days of the date of this order.

By Order of the Department,